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Holme Roberts & Owen LLP

November 8, 2000

James D. Freeman
Trial Attorney
United States Department of Justice
Environment and Natural Resources Division
999 18th Street, Suite 945-NT
Denver, CO 80202

Re: Your November 2, 2000 Letter

Dear Jim:

Thank you for the sampling results you sent me with your November 2 letter. You are misinformed, however, as to W.R. Grace and Co. - Conn.'s ("Grace") supposed participation in that sampling activity. Neither Grace nor its consultant, URS, were asked to participate in that sampling and did not obtain split samples as you suggest. You should also know that Grace was refused permission to sample the Parker property last spring and, therefore, cannot confirm the analytical summaries that you sent me. Even assuming that those summaries pertain to analytical results validated pursuant to appropriate protocols (which is not apparent from the limited documentation you sent me), it appears that the soils from every stockpile EPA sampled at the Screening Plant are contaminated with elevated levels of hydrocarbons and heavy metals.

I also believe that your information regarding the final work plan is incorrect. The draft work plan available at the Information Center was just that – a draft, not a final document. EPA refused to provide Grace with a final draft until it released what it purported to be the "final" last month. The copy provided to Grace was dated July 15, 2000 and was missing several referenced attachments, in particular critical maps, diagrams or descriptions of exactly where EPA intended to dispose of waste on KDC's property. More important, that document does not address any proposed response action on any KDC property. Again, please send me a complete copy of the final work plan at your earliest convenience.

Our concerns regarding worker safety and liability remain unchanged by your letter. Your argument that CERCLA does not address your contractor's insurance policies does little to reassure KDC that the policy provides KDC with any coverage for liability created by EPA or its contractors. I note that you have failed to provide that policy as previously requested and I therefore reiterate that request.

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As I have stated many times to you in writing and on the telephone, indemnity is not the only means by which the government can take responsibility for the potential harm and consequent liability resulting from its proposed activities on KDC's property. A contractual release, covenant-not-to-sue, contribution protection and insurance are other options that KDC is open to discuss, as well as indemnity. The statutory prohibition to indemnify discussed in your letter simply does not apply to KDC. KDC never owned or operated the Screening Plant; KDC never arranged for disposal of hazardous substances at the Screening Plant; KDC never transported hazardous substances to the Screening Plant for disposal. Therefore, KDC is not a PRP with respect to the Screening Plant and 42 U.S.C. § 9619(c) does not apply.

As you see, like the other objections the government has raised to the waste disposal terms proposed by KDC, your section 9619(d) argument is really a non-issue. If the government is seriously interested in expediting resolution of the Screening Plant waste disposal issue, I urge you and your client to sit down with KDC to work out reasonable terms for a disposal agreement rather than send more letters that seem to discover new obstacles to agreement with each exchange.

Finally, Grace and KDC are anxious to begin implementation of Grace's work plan for cleanup activities at the Kootenai Flyway and Bluffs properties. We are also hopeful that EPA will provide useful comments to the work plan and that those comments will be received in the very near future. Grace and KDC look forward to moving forward quickly on the cleanup and trust that the government will not attempt to obstruct those activities as threatened in your October 26 letter.

Please contact me if you have any questions or concerns regarding this matter.

Sincerely,

Jay McCarthy